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博 士 学 位 论 文

论国际投资条约的“人本化”趋势

A Study on the Trends towards Humanization  
of International Investment Treaty

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## 内容摘要

随着全球化的深入与国际投资的迅速发展，国际投资条约几乎形成了覆盖全球的投资保护体系。然而伴随着投资者利益与东道国利益的冲突，国际投资法律争端频频发生，仲裁案件数量节节攀升。现有的国际投资条约以及国际投资仲裁机制的发展开始面临挫折和困境。究其原因，主要是在于国际投资条约自身存在一定的“先天不足”，而在发展过程中由于过度强调保护投资者的利益又陷入了“后天失调”的尴尬境地。事实上，国际投资条约的存在不仅仅应当保护投资者的利益，还应当兼顾与投资活动相关的东道国国民的私人利益与集体利益，并有利于东道国及国际社会整体可持续发展目标的实现。有鉴于此，本文基于当前国际投资条约的新发展与新实践，对国际投资条约发展的“人本化”的趋势开展分析和论述。这种趋势的根本特点在于以“人的利益”为核心，并作为法律发展与保护的最终目标。法律所保护与发展的对象不仅仅包括纯粹个人的利益，还应当包括由个人而组成的团体与集体的利益，并使得国际投资条约呈现“主体多样化”以及“功能多元化”的特征，能够在国际投资条约的实体规定适用和程序规定运行上促使投资者、东道国国民乃至其他利益攸关方的权益达到平衡，同时使得近期的经济利益以及远期可持续发展的社会利益之间产生协调的空间和余地。本文以国际投资条约的“人本化”趋势为论题，围绕国际投资条约在实体和程序方面如何保障更为广泛的主体权益展开详细论述。

本文全文共分为导论、正文、结论三大部分，其中正文共五章：

第一章主要对国际投资条约“人本化”趋势的来源与历史进行分析。本章详细阐释了“人本化”趋势的由来及其发展历程，并论述了法学领域“人本主义法律观”的内涵与特点，进而对于国际法层面“人本化”趋势发展的核心要素和基本进程开展论述，借此归纳出国际投资条约“人本化”趋势的基本特点，作为后续章节的论证基础。

第二章着重论述国际投资条约“人本化”趋势产生的动因。本章首先提

出国际投资条约自身存在“先天不足”与“后天失调”的缺陷，这也是国际投资条约“人本化”趋势的生成环境与大背景。在此基础上，本章论证了国际投资条约“人本化”趋势产生的内在动因和外在动因。其中，内在动因主要是法律结构内部权利的冲突以及国际经济法律机制的调整与发展，而外在动因主要是“市民社会”的兴起使得社会结构从“二元对立”转向“三足鼎立”，私人的经济利益与社会公共利益之间产生了关联与纽带。上述两方面的动因共同作用，促进了国际投资条约“人本化”趋势的产生。

第三章主要探讨国际投资条约实体层面“人本化”趋势的体现。在“人本化”趋势的影响下，国际投资条约实体层面呈现出“条款内容具体化”与“条约功能多元化”的特征，这两大特征将有效地缓解国际投资条约内容规定模糊与过度偏向保护投资者利益的问题。同时本章将以“间接征收条款”与“重大安全例外条款”为例，论证在“人本化”趋势的影响下实体层面条款适用的变化，并分别总结出其更加注重利益保护平衡的特征。

第四章主要探讨国际投资条约程序层面“人本化”趋势的体现。本章的主要观点是，国际投资条约的“人本化”趋势对于现行国际投资仲裁机制（ISDS）的运行和设计产生了积极影响。一方面，仲裁员意识到其不仅要维护投资者的利益，还对投资行为外部环境的稳定和与投资行为相关的整体利益的维护负有责任。另一方面，最新的谈判缔约实践表明，国际投资仲裁保护机制仍然需要面对东道国方面的担心与质疑。该机制本身能够保护私人利益的价值和功能不应被全盘否定，但应当“主动求变”，通过更为具体的制度设计加大对于东道国以及利益攸关方的保护力度。

第五章则对国际投资条约的“人本化”趋势进行评价。本章指出，国际投资条约的“人本化”趋势与其新出现的发展动向之间存在积极互动的关系，并继续反映在更新的缔约策略、权利规定以及新出现的“可持续发展投资框架”之中。而我国应当在此基础上，结合自身的特点，在谈判策略和制度建设方面有效利用国际投资条约“人本化”趋势的发展特点，更好地保护自身投资者与国民的利益。

**关键词：** 国际投资条约；人本化；多元化

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## ABSTRACT

With the further development of globalization and international investment, international investment treaties almost form the global investment protection system. However, with the conflict between the benefits of investor and host states, international investment disputes occur frequently and the number of arbitration cases grows rapidly. The current development of international investment treaties and international investment arbitral mechanism start to confront with setbacks and difficulties. The reason lies in the “inherent shortage” of international investment treaties as well as the awkward situation of “acquired defect” in the process of development. In fact, the existence of international investment treaties should not only protect the benefit of investors but also consider the private benefits and collective interest of host state national relevant to investment activities, in favor of accomplishing the objective of sustainable development of host countries and international society. On the basis of new development and practice of international investment treaties, the dissertation analyzes and discusses the tendency of humanization in the development of international investment treaty. The fundamental character of the trend is that the ultimate objectives are human benefits centered as well as protection and development of law; it not only protects private interest but also collective interests of communities which consists of individuals, thus the substantive regulation of international investment treaties has the character of diverse subjects and diversified functions, enabling the application of substantive regulation of international investment treaties and promoting the balance of the interests between national of host state and other stakeholders, making sure to coordinate the near-term economic benefits and long-term social interests of sustainable development. Under the topic of the tendency of humanization in international investment treaties, the dissertation discusses how to guarantee more extensive rights and interests in substantive and procedural aspects.

This dissertation is composed of three parts, i.e. an Introduction, the Main Text and a Conclusion. The Main Text includes five chapters.

Chapter One focuses on the origin and history of the tendency of “humanization” in international investment law. This chapter elaborates the historical origin and development of trend of “humanization” and clarifies the connotation and character of “legal concept of humanization” as well as key elements and basic process of the tendency of “humanization” in international investment law.

Chapter Two emphasizes the dynamic reasons of the tendency of “humanization”. This chapter first proposes the “inherent shortage” and “acquired defect” of international investment treaties, which is also the formation environment and background. On this basis, this chapter clarifies the internal dynamic reason and external dynamic reason. While the internal reason mainly refers to protecting the expansion of rights as well as the adjustment and new development of international economic law mechanism, the external dynamic reason enables the structure of civil society changes from “binary opposition” to “tripartite confrontation”, thus combining the private economic benefits and social public interests. The above two dynamic reasons function together and facilitate the formation of tendency of “humanization” in international investment law.

Chapter Three mainly approaches the reflection of tendency of “humanization” on the substantive level of international investment treaties. Under the influence of “humanization”, the substantive level of international investment treaties presents the characters of “agreement terms’ specialization” and “treaty function’s diversity”. These characters could effectively alleviate the ambiguity of contents of international investment treaties and undue inclination to protect investors’ benefits. This chapter analyzes the application of substantive terms under the tendency of “humanization” by taking “clause of indirect expropriation” and “essential security exception clause” as examples.

Chapter Four discusses the reflection of tendency of “humanization” on the substantive level of international investment treaties. The main view of this chapter is that the tendency of “humanization” of international investment treaties has positive

impact on the operation and design of current international investment arbitration mechanism (ISDS). On one hand, arbitrators realize that they should not only protect the benefits of investors but also take charge of the external environment of investment and the preservation of entire interest relevant to investment. On the other, the newest negotiation practice shows that the mechanism of international investment arbitration has been confronting disqualification and worry from host states. Although the fact the mechanism could provide the value to protect investors' benefit should not be denied, it should change flexibly to improve the protection of host states and stakeholders by specific institutional design.

Chapter Five aims to evaluate the tendency of “humanization” of international investment treaties. The chapter points out it is positive interaction between the tendency of “humanization” reflecting in the new contracting strategies, regulations of rights as well as “sustainable development investment framework” and other new development trends. To protect national and investors' interests, China should utilize the development character of the tendency of “humanization” of international investment treaties in the aspect of negotiation strategy and institution constitution by combining our own characters.

**Key Words:** International investment treaty; humanization; diversity

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缩略语表（Abbreviations）

序号	简称	英文全称	中文译名
1	<b>BIT</b>	Bilateral Investment Treaty	双边投资条约
2	<b>FTA</b>	Free Trade Agreement	自由贸易协定
3	<b>GATT</b>	General Agreement on Tariffs and Trade	《关税和贸易总协定》
4	<b>ICSID</b>	International Center for the Settlement of Investment Disputes	解决投资争端国际中心
5	<b>IISD</b>	International Institute for Sustainable Development	国际可持续发展机构
6	<b>IPFSD</b>	Investment Policy Framework for Sustainable Development	国际可持续发展投资框架
7	<b>IAs</b>	International Investment Agreements	国际投资条约
8	<b>ISDS</b>	Investor-State Dispute Settlement	“投资者-东道国” 国际投资争端解决机制
9	<b>MAI</b>	Multilateral Agreement on Investment	《多边投资条约》
10	<b>NAFTA</b>	North American Free Trade Agreement	《北美自由贸易协定》

11	<b>NGOs</b>	Non-Governmental Organizations	非政府组织
12	<b>OECD</b>	Organization for Economic Co-operation and Development	经济合作与发展组织
13	<b>TPP</b>	Trans-Pacific Partnership (Agreement)	跨太平洋伙伴关系（协议）
14	<b>UNCITRAL</b>	United Nations Commission on International Trade Law	联合国国际贸易法委员会
15	<b>UNCTAD</b>	United Nations Conference on Trade and Development	联合国贸易和发展会议

## 案例表 (Table of Cases)

- [1] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17.
- [2] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8.
- [3] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9.
- [4] *Enron Corp. Ponderosa Asset, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3.
- [5] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9.
- [6] *Glamis Gold Ltd v US*, UNCITRAL/NAFTA.
- [7] *International Thunderbird Gaming Corp. v United Mexican States*, UNCITRAL.
- [8] *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. Arb/02/1.
- [9] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3.
- [10] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1.
- [11] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1.
- [12] *Methanex Corporation v. United States of America*, UNCITRAL.
- [13] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL.

[14] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16.

[15] *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6.

[16] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.

[17] *Waste Management Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3

[18] *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/1.



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